**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

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| **JOHN D. GILMORE** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | |
| **HENKE MANUFACTURING COMPANY** | ) | Docket No. 1,074,792 |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **SENTRY INSURANCE** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant, through William L. Phalen, requests review of Administrative Law Judge William G. Belden's March 24, 2016[1] preliminary hearing Order. Brandon A. Lawson appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the December 14, 2015 deposition transcript of claimant and the March 23, 2016 preliminary hearing transcript and exhibit thereto, in addition to all pleadings contained in the administrative file.

## ISSUE

The judge found claimant failed to prove personal injury by accident arising out of and in the course of his employment on July 9, 2015.

Claimant requests the Order be reversed, arguing he met his burden of proof. Claimant contends the only evidence is his testimony and respondent has presented no evidence to undermine his credibility. Respondent did not file an appeal brief.

The only issue is: did claimant sustain personal injury by accident arising out of and in the course of his employment, including whether his asserted accident was the prevailing factor causing his injury?

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[1] The Order states 2015; it should read 2016.

## FINDINGS OF FACT

Claimant, 26 years old, is an inmate at the Lansing Correctional Facility (LCF). Claimant testified he had asthma as a child, but denied having breathing problems as an adult before working for respondent. For two years, claimant worked for respondent as part of a work release program. Some of his duties consisted of using a sandblast gun to clean and prepare metal for painting. Claimant performed these duties in a booth measuring approximately 20' by 30'. He described the environment as "dusty" and like a "fog."[2] He wore protective clothing, including a mask and respirator. According to claimant, the respirator pumped in fresh air, but did not block dust or chemicals, which he would inhale and could taste in his mouth. Claimant testified his work left him covered in dust.

Claimant testified he took and failed a respiratory fit test before working in the booth. Claimant testified he relayed his concerns about having failed the test to Jason Nitts, who was apparently his supervisor, and Mary Gould, respondent's director of finance and administration. Claimant indicated Mr. Nitts told him he had no choice other than to work in the booth and Ms. Gould told him not to worry.

In February 2015, claimant developed breathing problems and advised management. Claimant testified he was told to do the job or be terminated. He continued working, but testified his breathing worsened and he told the plant manager. According to claimant he was assigned a different job in June 2015 because of his breathing problems.

On July 9, 2015, claimant was reassigned to the sandblasting booth, despite telling the plant manager that he had problems working in the booth. The record is not entirely clear, but claimant indicated the mask was either hot or the air coming from the mask was hot, which he reported to the plant manager. According to claimant, the plant manager pretended to fix the mask and sent him back to work. Claimant testified he was reluctant to return to the booth, but perceived he would be fired if he did not do so. Claimant testified the mask and respirator malfunctioned and he was not getting fresh air; when he used the sandblaster he would get less airflow into his mask. Claimant indicated he struggled to breathe and had to leave the booth gasping for air after about ten minutes. He reported the incident to management and asked to see a doctor. Respondent did not provide medical treatment, but had him hold his hands above his head to breathe better. Respondent sent him back to LCF. That same day, claimant received medical treatment at LCF in the form of a breathing treatment. He later had additional breathing treatments, an inhaler, medication and saw a medical doctor twice at LCF. According to claimant, he was told at LCF that he will have to be on breathing medications for a long time, maybe even the rest of his life. Clamant was subsequently terminated by respondent and given no reason for his termination.

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[2] Clmt Depo. at 15.

Ms. Gould testified claimant underwent a pre-employment physical. As part of the physical, claimant completed a health history form on July 24, 2013,[3] reporting prior shortness of breath, but denying asthma. A "General Physical Examination" form, apparently signed by William Raue, D.O., indicated claimant had a normal respiratory examination on July 24, 2013.

On October 8, 2014, claimant completed a "Respirator Medical Evaluation Questionnaire" and noted he previously had asthma, but did not currently have shortness of breath. What appears to be a lung function test conducted on October 8, 2014, was listed as normal, as was a respiratory physical conducted that same day by Walter Dean, M.D. Ms. Gould did not know why claimant thought he failed the respiratory fit test.

The judge's Order states:

> In this case, Claimant's testimony regarding the respirator fit test was contradicted by other evidence in the record, but Claimant's testimony regarding his prior childhood asthma is consistent with the medical records concerning Claimant's prior medical condition. Claimant's testimony regarding the dusty working conditions and the failure of the mask and respirator was uncontradicted. Claimant's testimony regarding his breathing problems was also uncontradicted. There is no medical evidence, however, concerning the diagnosis of Claimant's condition or the cause of Claimant's condition. The Court is unable to determine whether Claimant's breathing problems were the product of an acute injury, an aggravation of a prior condition or the result of a personal condition unrelated to work Claimant performed for Respondent. In the absence of any medical evidence of Claimant's alleged injuries or need for treatment, the Court must conclude Claimant failed to meet his burden of proving he met with personal injury from an accident arising out of and in the course of his employment in Docket Number 1,074,792.[4]

Thereafter, claimant appealed.

## PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2014 Supp. 44-501b(c), the burden of proof is on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

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[3] While this form is dated July 24, 2017, that is an impossibility and it likely corresponds with other medical records dated July 24, 2013.

[4] ALJ Order at 3.

K.S.A. 2014 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

> . . .
>
> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

"[M]edical evidence is not necessary to prove causation generally."[5] "A claimant's testimony alone is sufficient evidence of his own physical condition."[6] To prove the prevailing factor requirement, a "[c]laimant need not produce medical evidence."[7]

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."[8]

Appellate courts are ill-suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder.[9] The Board often opts to give some deference – although not statutorily mandated – to a judge's credibility findings regarding a witness where the judge has the first-hand opportunity to do so.[10] However, the Board is as equally capable as a judge in reviewing evidence when a witness does not testify live in front of the judge.[11]

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[5] *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, 844, 316 P.3d 796 (2013), *rev. denied* Jan. 15, 2015; see also *Webber v. Automotive Controls Corp.*, 272 Kan. 700, 705, 35 P.3d 788 (2001).

[6] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

[7] *Rose v. Sears*, No. 1,075,426, 2016 WL 453044 (Kan. WCAB Jan. 26, 2016); see also *Strale v. General Motors, LLC*, No. 1,074,211, 2015 WL 8006369 (Kan. WCAB Nov. 30, 2015).

[8] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976).

[9] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[10] *King v. Sealy Corp.*, No. 1,059,645, 2016 WL 858309 (Kan. WCAB Feb. 23, 2016).

[11] See *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 142, 343 P.3d 114 (2015).

## ANALYSIS

Claimant's testimony is uncontradicted that he worked in a dusty environment, he inhaled dust and/or chemicals and his breathing problems are related to such exposure. Absent sufficient information to the contrary, the evidence shows claimant was exposed to dust and/or chemicals while sandblasting and such exposure caused his injury by accident.

The judge made no credibility determination regarding any witness. In this Board Member's view, claimant's belief that he did not pass his respiratory test does not significantly impact his credibility.

This Board Member disagrees with the appealed Order's requirement that claimant must present medical evidence or a working medical diagnosis to establish compensability. By statute, what constitutes the prevailing factor is based on "all relevant evidence." All relevant evidence includes any and all relevant medical evidence, but the claimant's burden in proving prevailing factor is not restricted to medical evidence.

Claimant established compensability for an injury by accident. There is a causal connection between claimant's work and his resulting accident. All relevant and current evidence establishes claimant proved his accident was the prevailing factor in his injury and need for medical treatment. Claimant's injury was not due to the natural aging process or activities of day-to-day living. His accident or injury did not arise out of a neutral risk with no particular employment or personal character. There is either no proof or insufficient proof that claimant's injury by accident is due to a personal risk or that his accident or injury arose either directly or indirectly from idiopathic causes. There is either no proof or insufficient proof of what may be "solely" an aggravation of a preexisting condition or the existence of a preexisting condition. Rather, claimant's uncontradicted testimony establishes compensability.

## CONCLUSIONS

Claimant's testimony establishes he sustained personal injury by accident arising out of and in the course of his employment on July 9, 2015, including that the prevailing factor in his injury and need for medical treatment was his exposure to dust and/or chemicals while performing sandblasting.

**WHEREFORE**, this Board Member reverses the March 24, 2016 Order and remands for the judge's consideration of claimant's request for medical treatment.[12]

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[12] The above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. This review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**IT IS SO ORDERED.**

Dated this _____ day of May, 2016.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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